TOPICAL INDEX

	Page
Preface	1-2
Question Presented	2-3
Statement of the Case	4-8
Argument in Opposition to Review on a Writ of Certiorari	8-22
Conclusion	22
Certificate of Service	23

TABLE OF CITATIONS

CASES

	Page
Boutilier v. Immigration Service, 1967, — U.S. —, 87 S. Ct. —, 18 L.ed.2d. 661	14
Boyd v. County of Dade, Fla. 1960, 123 So.2d 323	6
Doremus v. Board of Education, 1952, 342 U.S. 429, 72 S. Ct. 394, 96 L.ed. 475	15-17
Flores v. Los Angeles Turf Club, Inc., Cal. 1961, 361 P.2d 921	9-10
Inman v. City of Miami, Fla. App. 1967, 197 So.2d 50	5-6, 9
Nickola v. Munro, Cal. App. 1958, 328 P.2d 271	12-14
Poe v. Ullman, 1961, 367 U.S. 497, 81 S. Ct. 1752, 6 L.ed.2d. 989	17-22
Robinson v. State of California, 1962, 370 U.S. 660, 82 S. Ct. 1417, 8 L.Ed.2d. 758	14
Stoumen v. Reilly, Cal. 1951, 234 P.2d 969	9
Vallerga v. Department of Alcoholic Beverage Com., Cal. 1960, 347 P.2d 909	9

TABLE OF CITATIONS (cont.)

Page

TREATISE

4A C.J.S. Appeal and Error, Sec. 443, p. 112 8

MODEL PENAL CODE

Proposed Official Draft of The American Law Institute Model Penal Code, Section 2.02 11

RULES

Rule 21.1, Supreme Court of The United States, Revised Rules 2

Rule 21.2, Supreme Court of The United States, Revised Rules 2

Rule 4.5.c.(6), Florida Appellate Rules, 1962 Revision 7-8

Rule 1.14, Florida Rules of Civil Procedure, 1965 Revision, 30 F.S.A. 4-5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 711

RICHARD A. INMAN,

Petitioner,

v.

CITY OF MIAMI, a Municipal Corporation, and RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit In and For Dade County, Florida,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District.

PREFACE

The following abbreviations will be used throughout this brief:

RR. — Respondents' certified portions of the Record.

District Court — The District Court of Appeal, Third District, State of Florida.

Petitioner states in the first portion of his brief, at p. 2:

> "The record in the District Court of Appeal, Third District, is no longer available from that Court, it having been sent back to the lower court. Since the record in the Supreme Court of Florida contained the essential items (all of which were part of the record before the District Court of Appeal of Florida, Third District), a certified copy of the record in the Supreme Court of Florida has been provided."

Respondents do not know what Petitioner has had certified as a transcript of the record in this case, since said transcript admittedly is not "... a transcript of the record in the case, including the proceedings in the court whose judgment or decree is sought to be reviewed ...", as required by Rule 21.1, Supreme Court of The United States, Revised Rules, nor has Petitioner indicated, on his notification of filing the instant Petition for a Writ of Certiorari, "the contents of the record filed ... either itemized in detail ... or appropriately summarized ..." as required by Rule 21.2, supra.

QUESTION PRESENTED

The Petitioner's omission of the word "knowingly" at a most pertinent place in his statement of the "Question Presented" indicates the weakness of his case. By repeating the "Question Presented" as framed by the Petitioner, with the word "knowingly" placed in said question where it should have been placed by Petitioner, Respondents very respectfully submit that they have pro-

vided the key to the reason, and argument supporting the reason, why this Petition should be denied.

Petitioner's "Question Presented" (which appears at pp.2-3 of his Petition) with the word "knowingly" inserted by the Respondents where it has been omitted by the Petitioner, is as follows:

> "Is a city ordinance which prohibits a liquor licensee from knowingly employing a homosexual person, or from knowingly selling to, serving or allowing a homosexual person to consume alcoholic beverages, or to knowingly allow two or more homosexual persons to congregate or remain in his place of business, violative of the rights of the petitioner, an admitted homosexual, to freedom of association, due process and equal protection of the laws, under the First and Fourteenth Amendments to the United States Constitution, respectively?"

Petitioner, further, states in his "Question Presented" that he is "an admitted homosexual". As can be seen by the Respondents' certified portions of the record, although alleging that he is a homosexual in his petition for declaratory relief, Petitioner denied that he is a homosexual shortly thereafter in a voluntary appearance on a television program (RR. 3-4).

Thus, in truth, and based on the Petitioner's latest utterance on the subject, in place of the words "an admitted homosexual" in the above quoted "Question", the words "a person who denies being a homosexual" should appear.

STATEMENT OF THE CASE

The following corrections to the "Statement of the Case" as framed by the petitioner are necessary.

Respondents moved to strike those portions of petitioner's petition for declaratory relief in which petitioner alleged that he is a homosexual person on the ground that, after filing the petition for declaratory relief, petitioner stated publicly, on a television broadcast, that he was not a homosexual person (RR. 1-4).

Under the Florida rule governing such a motion to strike, summary judgment can be entered as a result of such a proceeding. Rule 1.14, Rules of Civil Procedure, 1965 Revision, 30 F.S.A., states:

> "RULE 1.14. SHAM PLEADINGS: EXCEPTIONS FOR IMPERTINENCE, ETC., ABOLISHED.
>
> (a) Motion to Strike. If a party deems any pleading or part thereof filed by the other party to be a sham, he may, before the cause is set for trial, move to strike said pleading or part thereof and the court shall hear said motion, taking evidence of the respective parties, and if the motion be sustained, the pleading to which the motion is directed shall be stricken. Default and summary judgment, decree, decree pro confesso, and summary decree, on the merits, may, in the discretion of the court, be entered, or the court may for good cause shown, permit additional pleadings to be filed.

(b) Same—Contents. The motion to strike shall be sworn to and shall set forth fully the facts on which the movant relies and may be supported by affidavit. No traverse of the motion shall be required.

(c) Exceptions for Impertinence, etc., Abolished. Exceptions to pleadings for scandal, impertinence or irrelevancy are abolished but the court may, upon motion to strike or upon its own initiative, strike out any redundant, impertinent, irrelevant or scandalous matter which is prejudicial to the excepting party upon such terms as the court shall think fit."

Respondents motion to strike was denied (RR. 5), but respondents assigned this denial as error in its cross-assignments of error in connection with petitioner's appeal to the District Court (RR. 7).

The District Court, in the decision sought to be reviewed in the instant proceeding, stated, relative to this assignment of error (Inman v. City of Miami, Fla. App. 1967, 197 So.2d 50, at p. 52):

"The City by cross assignment contends that the court should have granted its motion to strike the complaint under Rule 1.14 Florida Rules of Civil Procedure, 1965 Revision, 30 F.S.A., because there was unrefuted evidence showing that appellant was not a homosexual at the time the proceeding was instituted. In view of our conclusion upon the appeal, it is unneces-

sary to consider the exercise of the trial court's discretion in this particular."

Further, in Petitioner's "Statement of the Case", petitioner states:

> "...The said ordinance makes it a crime for the owner of an establishment serving intoxicating liquor to employ homosexuals, to knowingly serve alcoholic beverages to homosexuals or to allow two or more homosexuals to congregate or remain in his place of business."

It is necessary to correct the above quoted portion of petitioner's "Statement of the Case". In the first place, a violation of a municipal ordinance in Florida is an offense, not a crime, Boyd v. County of Dade, Fla. 1960, 123 So.2d 323.

Much more important, however, is petitioner's studied omissions of the term "knowingly" in two very important places in the above quoted statement. This quoted statement corrected to include the term "knowingly" with same underlined to clearly show the fact and place of these omissions is set out, as follows:

> "...The said ordinance makes it an offense for the owner of an establishment serving intoxicating liquor to knowingly employ homosexuals, to knowingly serve alcoholic beverages to homosexuals or to knowingly allow two or more homosexuals to congregate or remain in his place of business."

In further correction of petitioner's "Statement of the Case", respondents state that petitioner did not file a petition for rehearing addressed to the decision of the District Court now sought to be reviewed nor was a petition for rehearing filed addressed to the order of the Supreme Court of Florida denying petitioner's petition for a writ of certiorari.

Contrary to petitioner's assertion that his petition for a writ of certiorari "was timely filed in the Florida Supreme Court", respondents state that said petition was not filed within the automatic stay provision of Rule 4.5.c.(6), Florida Appellate Rules, 1962 Revision, nor did petitioner obtain a stay order from the Florida Supreme Court as required by said rule, which states in pertinent part:

> "The petition for certiorari under this rule shall be filed in the Supreme Court within 60 days from the rendition of the order, decision or judgment of the district court of appeal. The petition shall set forth briefly and clearly the grounds for invoking jurisdiction of the Supreme Court and the facts relied upon for the issuance of the writ. Unless the district court shall otherwise direct for good cause shown after notice and hearing, a petition for certiorari filed in the Supreme Court within 15 days from the date of the disposition of a petition for rehearing shall automatically stay further proceedings in the district court and the trial court until the disposition of said petition by the Supreme Court; otherwise such petition for certiorari shall operate as a stay of such pro-

ceedings only upon the order of the Supreme Court or the Chief Justice after due notice to the adverse party."

By not coming within the automatic stay provision or by not obtaining a stay order, has the period of time limited for instituting certiorari proceedings in the Supreme Court of the United States been tolled?

If an order staying all proceedings has the effect of tolling the running of the period limited for taking an appeal, it is submitted that the failure to obtain such a stay does not toll the running of the period. In 4A C.J.S. Appeal and Error, Sec. 443, at p. 112, it is stated:

"... An order staying all proceedings in a cause tolls the running of the period limited for taking an appeal..."

Thus, in the instant case, by filing his petition for a writ of certiorari in the Supreme Court of The United States on the ninetieth day after denial of his Supreme Court of Florida petition for a writ of certiorari and after failing to come within the automatic stay provisions of Rule 4.5.c.(6), supra, as to Supreme Court of Florida certiorari proceedings, it is submitted that the instant petition has not been timely filed.

ARGUMENT IN OPPOSITION TO REVIEW ON WRIT OF CERTIORARI

The District Court explained why the "generalized attack upon the ordinance as a whole was properly

denied". The District Court said (Inman v. City of Miami, Fla. App. 1967, 197 So.2d 50, at p. 51):

> "It may be that the ordinance is inartfully drawn and that enforcement of one or more provisions may prove difficult or even impossible. Nevertheless, the question here presented is whether it is void as a whole. When a court construes the validity of an ordinance, it must construe it to be legal if it is possible to do so. It must also strive to construe it as to give reasonable effect to its provisions. City of Miami v. Kayfetz, Fla. 1957, 92 So.2d 798. If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. State v. City of Miami, 101 Fla. 585, 134 So. 541. (1931)."

In a California case, Flores v. Los Angeles Turf Club, Inc., Cal. 1961, 361 P.2d 921, in which case two of the California cases cited by the petitioner are discussed, (Vallerga v. Department of Alcoholic Beverage Com., Cal. 1960, 347 P.2d 909; Stoumen v. Reilly, Cal. 1951, 234 P.2d 969), this general principle is stated, at p. 925, as follows:

> "In examining the rationality of the classification made by the pertinent provision of section 19561.5, the general principle must be considered that '[w]hen the classification made by the Legislature is questioned, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts is presumed..."

At p. 923 of Flores, the Supreme Court of California stated:

> "...The Stoumen and Tarbox courts reasoned that the statutes involved, in mentioning only resort to the licensed premises for immoral purposes, or reputation for such conduct, failed to set a sufficiently definite standard for license revocation and did not base revocation on the licensees' failure to exclude a class of persons reasonably related to the legislative objective—that is, **persons presently conducting themselves improperly ON THE PREMISES.** The Vallerga court ordered the revocation set aside because it had been based on testimony as to patronage by homosexuals, **rather than the evidence as to improper acts committed on the premises.** This construction of Business and Professions Code, § 24200 was deemed necessary to save its constitutionality. The inference which may be drawn from the decisions in the Vallerga, Stoumen, and Tarbox cases is that in regulating the affairs of its licensees (or its citizens generally), **the state may not impose upon them the responsibility of governing conditions beyond their control,** and may not, by the application of general statutory standards, require them to undertake actions not specifically related to the objective which the state desires to accomplish. Accordingly, the regulated parties in these cases could not validly be divested of their licenses because of the somewhat unrelated past conduct of their customers..." (emphasis supplied)

Now, in examining the language of the Miami Code section in issue, what, if any, state of facts can reasonably be conceived that would sustain it?

The code section states that those in charge of an alcoholic beverage dispensing establishment cannot **knowingly** employ or sell to homosexuals, or, **knowingly** allow two or more homosexuals to congregate in such establishment. A homosexual person is a homosexual person as this term is commonly accepted and understood.

If a bartender observes a male customer kissing another male customer and fondling the other male customer's penis, should the bartender be held to the knowledge that these men are homosexuals within the meaning of the code section and that he cannot sell to them or allow them to congregate in his establishment?

In the Proposed Official Draft of The American Law Institute Model Penal Code (May 4, 1962) under Section 2.02 entitled "General Requirements of Culpability", the term "knowingly" is treated, as follows:

> "(b) **Knowingly.**
> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his

conduct, he is aware that it is practically certain that his conduct will cause such a result."

When the term homosexual person is "restricted in its application to those who presently perform acts of" homosexuality and the term "knowingly" is construed to mean awareness of homosexual conduct, isn't the factual statement, above, a reasonable conception of a state of facts that would sustain the validity of this code section?

Petitioner states in his brief (p. 5) that the District Court has ruled that "Because specific acts are made criminal in the State of Florida ... the State, by virtue of its police power, may inhibit the gathering of homosexuals where liquor is sold and prohibit the sale or service to them for on-premises consumption because the criminal acts, prohibited by Florida Statutes, Sec. 800.01 and 800.02, **when practiced** are of a homosexual nature." (emphasis supplied). Petitioner states that "what the State is doing is penalizing a status or condition when no criminal act is being committed."

This is petitioner's conclusion, however, and not that of the District Court or the respondents. In the enforcement of any provision of this code section, respondents would be guided, as indicated above, by the holdings in such cases as Nickola v. Munro, Cal. App. 1958, 328 P.2d 271, where, at p. 274, the court said:

"... We think that, before a licensee can be disciplined under this section, the licensee must have actual knowledge that his premises are being used for such purposes, or must know facts that

to a reasonable person would indicate that such was the fact. The usual and normal way that the tavern operator would or should know such fact is by the patrons engaging in such conduct on the premises that a reasonable man would know that the premises are being used as a 'resort for * * * sexual perverts.' We do not think that section 24200(c) was passed by the Legislature to repeal or to change the rule of the Stoumen case to the effect that improper or illegal or immoral conduct must occur on the premises before discipline of the licensee is permitted, but was passed with the Stoumen case in mind to clarify the rule of that case. This was the precise holding of this court in Kershaw v. Department of Alcoholic Beverage Control, 155 Cal. App.2d 544, 318 P.2d 494, decided in 1957. There the licensee was charged with allowing the licensed premises to be used in violation of the disorderly house statute involved in the Stoumen case, and as a 'resort for * * * sexual perverts' in violation of section 24200(e) of the Business and Professions Code. The evidence showed the commission of improper and immoral acts of the same general type as are here involved. This court stated (155 Cal. App.2d at page 548, 318 P.2d at page 496): 'There is evidence that such conduct was readily observable by the licensee and her agents, that much of it was observed by them, and that they took no measures to prevent or curb it. The evidence also supports an inference that these were not mere isolated, occasional, unexpected, unpre-

ventable and uncontrollable incidents.'" (emphasis supplied)

The very fact that petitioner has to read into the decision of the District Court a conclusion that is not only non-existent in the decision itself, but one that the District Court was not called upon to reach due to the shallowness of petitioner's case, if any, and the petitioner's questionable standing to sue; pin points, it is very respectfully submitted, the lack of a justiciable constitutional question, or, lack of a case or controversy within the appellate jurisdiction of the Supreme Court of the United States.

In the **Robinson v. State of California** case, 1962, 370 U.S. 660, 82 S. Ct. 1417, 8 L.ed.2d 758 cited by petitioner, Robinson **was convicted in the Municipal Court of Los Angeles** of violation of a statute making it a criminal offense for a person to be addicted to the use of narcotics.

In the **Boutilier v. Immigration Service** case, 1967, __ U.S. __, 87 S. Ct. __, 18 L.ed.2d. 661, cited by petitioner, Boutilier **was ordered deported** on the ground that he was, at the time of entry, an alien "afflicted with a psychopathic personality."

Here, not only is there no municipal court proceeding against the petitioner or against any owner, manager, or operator or employee of a business licensed to sell intoxicating beverages due to anything relating to the petitioner, but, as indicated above, no such proceeding is conceivable based simply on petitioner's WAIVERING ASSERTION that he is a homosexual person.

Petitioner can patronize any alcoholic beverage establishment in the City of Miami and he can remain there and congregate with others lawfully there, but the moment his conduct is such as described in the **Nickola** case, supra, he is inviting difficulty and if the circumstances are such that the management knows or should know of such conduct, a case for prosecution under the instant code section presents itself.

In the case of **Doremus v. Board of Education**, 1952, 342 U.S. 429, 72 S. Ct. 394, 96 L.ed. 475 a suit was brought against a board of education for a judgment declaring invalid a New Jersey statute providing for the reading of five verses of the Old Testament at the opening of each public school day. The United States Supreme Court held that no case or controversy within the appellate jurisdiction of the Supreme Court was presented. The Court said, starting at p. 430:

> "This action for a declaratory judgment on a question of federal constitutional law was prosecuted in the state courts of New Jersey. It sought to declare invalid a statute of that State which provides for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day. N.J. Rev. Stat., 1937, 18:14-77, N.J.S.A. No issue was raised under the State Constitution, but the Act was claimed to violate the clause of the First Amendment to the Federal Constitution prohibiting establishment of religion.
>
> No trial was held and we have no findings of fact, but the trial court denied relief on the

merits on the basis of the pleadings and a pretrial conference, of which the record contains meager notes. **The Supreme Court of New Jersey, on appeal, rendered its opinion that the Act does not violate the Federal Constitution, in spite of jurisdictional doubts . . .**"

And, starting at p. 432:

"**The view of the facts taken by the court below, though it is entitled to respect, does not bind us and we may make an independent examination of the record . . .**"

* * *

"**. . . There is no assertion that she was injured or even offended thereby or that she was compelled to accept, approve or confess agreements with any dogma or creed or even to listen when the Scriptures were read. On the contrary, there was a pretrial stipulation that any student, at his own or his parents' request, could be excused during Bible reading and that in this case no such excuse was asked. However, it was agreed upon argument here that this child had graduated from the public schools before this appeal was taken to this Court. Obviously no decision we could render now would protect any rights she may once have had, and this Court does not sit to decide arguments after events have put them to rest . . .**"

And, at p. 433:

> "The State raised the defense that appellants showed no standing to maintain the action but, on pretrial conference, perhaps with premonitions of success, waived it and acquiesced in a determination of the federal constitutional question. **Whether such facts amount to a justiciable case or controversy is decisive of OUR jurisdiction."**

And, at p. 434:

> **"We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such."** (emphasis supplied)

In the case of **Poe v. Ullman**, 1961, 367 U.S. 497, 81 S. Ct. 1752, 6 L.ed.2d 989 an action was brought for a declaratory judgment declaring invalid the Connecticut Statutes prohibiting the use of contraceptives. The United States Supreme Court held that the record disclosed no justiciable constitutional question for the reason that there was no showing that these statutes would be enforced against the plaintiffs.

In Poe, the Court said, at p. 498:

"These appeals challenge the constitutionality, under the Fourteenth Amendment, of Connecticut statutes which, as authoritatively construed by the Connecticut Supreme Court of Errors, prohibit the use of contraceptive devices and the giving of medical advice in the use of such devices. In proceedings seeking declarations of law, not on review of convictions for violation of the statutes, that court has ruled that these statutes would be applicable in the case of married couples and even under claim that conception would constitute a serious threat to the health or life of the female spouse."

And, starting at p. 501:

"... During the more than three-quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated, save in State v. Nelson, 126 Conn. 412, 11 A.2d 856. The circumstances of that case, decided in 1940, only prove the abstract character of what is before us. There, a test case was brought to determine the constitutionality of the Act as applied against two doctors and a nurse who had allegedly disseminated contraceptive information. After the Supreme Court of Errors sustained the legislation on appeal from a demurrer to the information, the State moved to dismiss the information. Neither counsel nor our own researches have discovered any other attempt to enforce the prohibition of distribution or use of contra-

ceptive devices by criminal process. The unreality of these law suits is illumined by another circumstance. We were advised by counsel for appellants that contraceptives are commonly and notoriously sold in Connecticut drug stores. Yet no prosecutions are recorded; and certainly such ubiquitous, open, public sales would more quickly invite the attention of enforcement officials than the conduct in which the present appellants wish to engage—the giving of private medical advice by a doctor to his individual patients, and their private use of the devices prescribed. The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. "Deeply embedded traditional ways of carrying out state policy * * *"—or not carrying it out—"are often tougher and truer law than the dead words of the written text." Nashville, C. & St. L. R. Co. v. Browning, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254.

The restriction of our jurisdiction to cases and controversies within the meaning of Article III of the Constitution, see Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246, is not the sole limitation on the exercise of our appellate powers, especially in cases raising constitutional questions.

The policy reflected in numerous cases and over a long period was thus summarized in the

oft-quoted statement of Mr. Justice Brandeis: "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 346, 56 S.Ct. 466, 482, 80 L.Ed. 688 (concurring opinion). In part the rules summarized in the Ashwander opinion have derived from the historically defined, limited nature and function of courts and from the recognition that, **within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity.** See Little v. Bowers, 134 U.S. 547, 558, 10 S.Ct. 620, 623, 33 L.Ed. 1016; People of State of California v. San Pablo & Tulare R. Co., 149 U.S. 308, 314, 13 S.Ct. 876, 878, 37 L.Ed. 747; United States v. Fruehauf, 365 U.S. 146, 157, 81 S.Ct. 547, 554, 5 L.Ed.2d 476. In part they derive from the fundamental federal and tripartite character of our National Government and from the role—restricted by its very responsibility—of the federal courts, and particularly this Court, within that structure. See the Note to Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436; Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488-489, 43 S.Ct. 597, 601, 67 L.Ed. 1078; Watson v. Buck, 313 U.S. 387, 400-403, 61 S.Ct. 962, 966-968, 85 L.Ed. 1416; Alabama State Federation of Labor,

etc. v. McAdory, 325 U.S. 450, 471, 65 S.Ct. 1384, 1394, 89 L.Ed. 1725.

These considerations press with special urgency in cases challenging legislative action or state judicial action as repugnant to the Constitution. "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." Parker v. County of Los Angeles, 338 U.S. 327, 333, 70 S.Ct. 161, 163, 94 L.Ed. 144. See also Liverpool, N. Y. & P. S. S. Co. v. Commissioners, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899. The various doctrines of "standing," "ripeness," and "mootness," which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations—each having its own "varied application"—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action. Stearns v. Wood, 236 U.S. 75, 35 S.Ct. 229, 59 L.Ed. 475; State of Texas v. Interstate Commerce Comm., 258 U.S. 158, 42 S.Ct. 261, 66 L.Ed. 531; United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 89-90, 67 S.Ct. 556, 564-565, 91 L.Ed. 754. "This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance, or a rem-

edy is not to be had here." State of Georgia v. Stanton, 6 Wall. 50, 75, 18 L.Ed. 721, approvingly quoting Mr. Justice Thompson, dissenting, in Cherokee Nation v. State of Georgia, 5 Pet. 1, 75, 8 L.Ed. 25; also quoted in State of New Jersey v. Sargent, 269 U.S. 328, 331, 46 S.Ct. 122, 70 L.Ed. 289. "The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement * * *." Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078." (emphasis supplied)

CONCLUSION

Accordingly, this petition for a writ of certiorari should be denied.

Very respectfully submitted,

ALAN R. ROTHSTEIN, City Attorney
S. R. STERBENZ, Asst. City Attorney
65 S. W. 1st Street, Miami, Florida
Attorneys for Respondent CITY OF MIAMI

By S. R. Sterbenz
S. R. Sterbenz
Assistant City Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing brief in opposition to the petition for a writ of certiorari and true copies of the respondents' certified transcript of record on appeal have been served this 13th day of December, 1967, by depositing same in the United States mail with sufficient postage pre-paid to Tobias Simon and Alfred I. Hopkins, Esqs., 1701 Meridian Avenue, Miami Beach, Florida, and Maurice Rosen and Judith A. Brechner, Esqs., 350 Lincoln Road, Miami Beach, Florida.

S. R. Sterbenz

S. R. Sterbenz
Assistant City Attorney